

Bangladesh's Unofficial Emergency: Managing the COVID-19 Crisis by Notifications

Ridwanul Hoque

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Bangladesh's responses to COVID-19 have been chaotic, uncoordinated and operating within a legal blackhole. The first positive case was confirmed on 8 March when the government was preparing for the gala centennial of the birth of the country's founding leader, Bangabandhu Sheikh Mujibur Rahman. Instead of a lockdown, a country-wide 'general holiday' was imposed for two weeks from 26 March, and which was later extended until 5 May. The scope of 'general holiday' was extensive with the closure of all government and private offices, schools and universities and, subject to stringent exceptions, all courts including the Supreme Court. Interestingly, whenever any new COVID-19 case is detected, the concerned suburb, village or district or, more particularly, the building is placed under 'lockdown' which is often done by an oral administrative order, so it is possible to have both a 'public holiday' and also a 'lockdown' as emergency measures taken in response.

Bangladesh is a unitary state with eight administrative divisions and 64 districts. Officially it is a parliamentary democracy, which however has been on a severe decline since the 2014 single-party elections, and with the recent 2018 elections providing no exception. The lack of democratic decision-making and multi-party constitutionalism has also been paired with an alarming rise of corruption. In the current COVID-19 crisis, the Deputy Commissioners (the most senior public officials in a district), executive magistrates, and the police all are in charge of enforcing the law and executive orders to prevent transmission. While the Army has been deployed in aid of the civil administration, the Bangladeshi Parliament, including the Cabinet as the central decision-making body in any democracy, has largely taken a back seat with no visible action.

Emergency Powers in the Constitution

The 1972 [founding Constitution](#) did not have general emergency powers except for a provision on war (Art. 63). Emergency provisions (Part IXA: arts 141A—141C) were incorporated in 1973 via the Second Amendment. They are largely pro-executive, with a little role for parliament to play. Art. 141A states that the President may proclaim a state of emergency on grounds of '*war or external aggression or internal disturbance*' with the previous written agreement of the Prime Minister. By a literal interpretation of these three grounds, the Constitution seems to provide no room for public health emergency, such as the outbreak of COVID-19. However, it may be considered a source of internal disturbance.

Although Bangladesh is using the metaphor of ‘war’ in its fight against COVID-19, and given that the executive *could* have interpreted the term ‘internal disturbance’ to include the public-health emergency, the country chose not to impose a state of emergency presumably in view of the previous abuses of emergency provisions. (Bangladesh had imposed emergencies in 1974, 1981, 1987, and 2007 – all on grounds of internal disturbances.) As explained below, however, Bangladesh has nevertheless imposed a *de facto* state of emergency in any sense of the term except in name. The consequences of the present COVID-19 restrictions are essentially similar to those of any official emergency. One might therefore argue that an official emergency in the interest of saving lives would have been a better approach. Reliance on the Constitution for the declaration of a limited emergency would have provided legitimacy and a more solid ground for the legal regulation of the COVID-19 crisis.

The only limitation the Constitution places on emergency powers is that it must not be over 120 days in duration, unless the Parliament approves a longer period. Every proclamation of emergency, therefore, needs to be laid before Parliament before its expiry. (By law, the gap between two sessions of parliament must not exceed 90 days.) A declaration of emergency can lead to two major consequences: First, during emergency, ‘the State’ may make law or take executive actions in derogation from six fundamental rights (Art. 141B): the freedom of *movement, assembly, association, thoughts and conscience, occupation and profession*, and the *right to property* (Arts 36—40 & 42). Second, the President may opt to ‘suspend’ the right to judicially enforce these or other fundamental rights. Although a blanket power, suspension of enforcement of fundamental rights may be avoided altogether or restricted to a few rights only.

The New ‘Legal’ and the COVID-19 Crisis

To gauge the nature of Bangladesh’s legal responses to COVID-19, it would be useful to have an overview of certain facts and actions on the ground. The Bangladesh situation is unique albeit mostly in a negative sense. It has one of the lowest rates of COVID-19 tests: currently 64,666 in a population of 160 million, [but a comparatively higher rate of official deaths \(168 out of 7,667 confirmed cases as of 30 April\)](#). Out of 64 districts, 47 do not have any ICU facilities at all. Yet the lockdown was only imposed over two weeks after the first confirmed case.

The initial country-wide public holiday was declared on 24 March citing the Rules of Business 1996, which is a constitutional instrument. The notification was quite unclear in its effect, and, in just two days, a significant number of people left Dhaka out of either fear or in holiday mode, raising the risks of transmission and infection. Then came the closure of public transport on 26 March, later followed by a ban on large gatherings in prayers and funerals. The legal authorities behind these restrictions remain unclear. During the lockdown, ready-made garments industry owners announced an imminent reopening of factories, leading thousands of workers to rush back on foot to Dhaka. The workers then returned back home following a government intervention, but the same saga has been repeated on 26 April, several days before the scheduled end of the restrictions on 5 May, with many

factories reopening and some even in the worst-hit areas. [Restaurants and some essential service offices also have reopened](#) since 28 April on 'a limited scale'. Public transport has not yet been put back on wheels. The mismanagement raises an important issue of who are making these decisions and how they are being made.

The most unpleasant side of the COVID-19 restrictions is the unemployment of millions and the consequent want of food, and the unreasonably high hike in the prices of essential commodities. Government has begun distribution of rice at nominal prices, and also as a relief measure. Some elected local leaders, mostly belonging to the ruling party, have [indulged in misappropriation of the relief products](#). As a response, the government withdrew politicians from the relief plan and instead tasked 64 of the most senior civil servants to coordinate relief-distribution. This shows how the crisis management has become increasingly bureaucratized. Many of those involved in misappropriation of reliefs have been dismissed and arrested, while the executive magistrates are enforcing the law against price-hikes and hoarding.

Bangladesh has joined the regional efforts at the SAARC-level in a joint fight against the pandemic, but it is the only country faced with the challenge of applying the legal order in the refugee camps in preventing and controlling the COVID-19 outbreak, where over a million of unrecognized Rohingya refugees live in densely housed shanties.

The Public Health Crisis and the Governing Law

With regard to the law dealing with the COVID-19 crisis, the applicable law is the [Communicable Diseases \(Prevention, Control, and Eradication\) Act 2018](#), which replaced several colonial laws including the [Epidemic Diseases Act 1897](#). The Act empowers the government to control any infectious disease or outbreak, to enforce 'isolation' of any 'infected' person (s. 14) and, importantly, to enact 'rules' to deal with a situation of health emergency (ss. 32 & 11(3)). Interestingly, the government has not enacted any such rules or regulations except by issuing one or two notifications. For example, on March 23, the Ministry of Health notified that COVID-19 is a communicable disease within the meaning of s. 4 of the 2018 Act. Yet the crisis was not declared to be a disaster under the Disaster Management Act 2012. This notification is the first source of subsequent actions of the government to contain and control the spread of the virus. Then, on 16 April, the Health Directorate issued a statutory order under s. 11(1) of the 2018 Act announcing the whole country as exposed to COVID-19 risks. The so called 'Declaration', however, made several instructions, with a 'request' to the public to comply and maintain social distance and curfew between 6 pm to 6 am. Non-compliance with the instructions is a punishable offence which may entail up to 3 month's imprisonment or 50,000 Taka fine (s. 25).

Not surprisingly, the new delegated legislation do not place any limitations upon the use of powers enumerated. To enforce the social distancing and stay-at-home instructions, the government amended the Mobile Courts Act 2009 to empower executive magistrates to hold summary trial of offences under the 2018 Act. Executive magistrates also enforce some provisions of the Penal Code 1860

that criminalizes an act likely to spread any infectious disease (ss. 269-270) and disobedience to quarantine rule (s. 271).

Impact of Unofficial Emergency or Executive-Imposed Restrictions

It almost goes without saying that the above administrative restrictions which create a state of unofficial emergency have significant impact on democracy and civic rights. From the point of democratic decision-making, the current situation in Bangladesh suggests that powers are being exercised from a centralized source without due legal processes nor the oversight or legislative underpinning of Parliament. The government's financial stimulus package, for example, does not have legislative approval, while Parliament has been prorogued after [its one-hour session on 18 April](#). There is a great uncertainty as to the flow and clarity of legal orders, which is antithetical to democracy and the rule of law. The restrictions have also had an impact on the people's right to life, liberty and freedom of movements, with little or no official justifications. A major fallout has been the closure of the Supreme Court that has power to enforce constitutional rights. Arguably, [the closure of the constitutional court has led to an *ipso facto* suspension of fundamental rights](#), which is a known consequence of an emergency. The Court recently issued a notice for its [limited reopening](#), which was soon [withdrawn](#).

The level of legal awareness and degree of law-abidance of the people, as well as the pattern and nature of official behaviour, varies from society to society. In Bangladesh, people are not complying with the imposed restrictions in an optimal way. In some cases, COVID-19 patients, suspected carriers, and even health professionals have been subjected to social hatred and stigma. On the other hand, law enforcement officials including executive magistrates have occasionally resorted to extra-legal means of punishments. The government agencies and departments have sometimes arrested people on the ground of spreading COVID-19 rumours. A doctor has been withdrawn from duty for questioning the quality of medical masks, while another six have been suspended for misconduct without following due process. It seems that, the emergency-like situation has led to a disproportionate restriction on the freedom of expression, which is [vital at all times and more so during the COVID-19 crisis](#).

Conclusion

It appears that Bangladesh's legal responses to the COVID-19 crisis are inconsistent, *ad hoc*, and deficient in transparency and democratic practices. The unprecedented nature of the pandemic requiring exceptionally urgent actions, may be attributed to the sorry state of affairs. A thoughtful, more legitimate approach could nevertheless have been taken. For example, as a commentator has rightly argued, [urgent legislation](#) similar to the Coronavirus Act 2020 of the UK could be enacted to better tackle the problem. Second, as the nature of the restrictions and their impact on the constitutional order of the polity show that the government has

effectively yet unofficially resorted to a state of emergency to deal with the public health emergency arising from the COVID-19 pandemic. While the question remains whether the legitimacy of these extraordinary measures can be read from the theory of 'constitutional exceptionalism' (of, e.g., [Poole](#), [Dyzenhaus](#), [Gross](#) and [Tushnet](#)) or exceptional legality (of, e.g., [Agamben](#)), the pandemic has unveiled the way a government navigates, and negotiates with, the constitutional means to tackle public health emergency in one of the most densely populated countries in the world.

Due to an editorial error an earlier version stated that a doctor had been arrested for questioning the quality of medical masks while he was in fact withdrawn from duty. The mistake has been corrected.

